

SAY WHAT? THE CASE FOR HEARSAY AT THE GUANTANAMO BAY MILITARY COMMISSIONS

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INTRODUCTION

Inside a nondescript, windowless building on the U.S. Naval Base at Guantanamo Bay, Cuba, pretrial hearings are underway for Khalid Sheikh Mohammed and other foreign nationals accused of terrorist-related crimes by the U.S. government.¹ Aside from a sign proclaiming “Camp Justice” that sits below a collection of flag poles several yards away, one would never suspect that this building, on the site of an abandoned airfield, houses the much-debated military commissions. Now in their third year, the military commissions continue to be a lightning rod for criticism from both inside and outside the legal community.² The general consensus among opponents of the commissions is that the proceedings are simply a rubber stamp for the prosecution, designed to guarantee the conviction and the timely execution of the accused.³ While critics point to several reasons as to why the commissions are purportedly unfair to the accused, one of their strongest allegations

1. *DOD Announces Charges Referred Against 9-11 Co-Conspirators*, U.S. DEP’T OF DEF. (Apr. 4, 2012), <http://www.defense.gov/releases/release.aspx?releaseid=15158>.

2. Ian Kysel & Aryeh Neier Fellow, *Guantanamo Dispatch: Improvising Basic Trial Rights*, ACLU (June 19, 2013, 10:11 AM), <https://www.aclu.org/blog/national-security-human-rights/guantanamo-dispatch-improvising-basic-trial-rights>.

3. *See A Plan to Close Guantánamo and End the Military Commissions*, ACLU, 6-7, 8, 14-15 (Jan. 2009), https://www.aclu.org/sites/default/files/images/asset_upload_file505_38424.pdf.

centers around the government's planned use of hearsay that would otherwise be inadmissible in traditional federal criminal trials.⁴

Because the rules of evidence for military commissions have been written to allow for the introduction of certain hearsay evidence, critics argue that this makes the commissions inherently biased and illegitimate.⁵ There is no question that the stringent protections for criminal defendants in the American court system, stemming from the Confrontation Clause in the Constitution, do not apply universally to the commissions' defendants. The assumption, however, that the military commissions must provide all the protections and rights found in the American court system or else lack legitimacy in the eyes of the world represents a false choice. There is clearly a middle ground that cannot be ignored. The reality is that while the rules of evidence in military commissions do allow for the admission of certain kinds of hearsay, otherwise not admissible in federal court, its use is widely accepted in similar international tribunals and appropriate protections are in place to balance any prejudice to the defendants.

The opponents of the commissions claim the government will use secret witnesses, and convict based solely on uncorroborated, unreliable hearsay, that may or may not have been the product of unlawful interrogation techniques.⁶ It is not hard to see why such an idea can be appealing to those skeptical of the commissions. After all, the proceedings occur largely out of reach for most Americans. Unlike a trial in federal court, where any member of the public is welcome to view the proceedings, observing the military commissions in Guantanamo Bay requires lots of advance planning, travel accommodations, and clearance from the Department of Defense.

As an alternative, many government leaders, activists and scholars alike have advocated for the trying of the terrorist suspects in federal court. Although the U.S. Justice Department obtained a grand jury indictment against the 9/11 conspirators, plans to try them in the U.S. District Court for the Southern District of New York were later

4. Kenneth Roth, Op-Ed., *Justice Cheated*, N.Y. TIMES, (May 6, 2012), http://www.nytimes.com/2012/05/07/opinion/justice-cheated.html?_r=0.

5. *Id.*

6. *See id.*; *see also* Kysel, *supra* note 2.

abandoned, much to the chagrin of certain groups, and the military commissions proceeded in Guantanamo Bay.⁷ This article does not seek to address the issue of whether a Guantanamo Bay military commission is the most appropriate forum to try the suspected terrorists. There are some very strong arguments that trying these suspects in a federal courthouse would be more efficient, less expensive and more transparent.⁸ Nevertheless, this article posits that the military commissions are still providing the defendants with adequate due process, with appropriate legal protections, and are being conducted in accordance with widely accepted international law. Part I of this article discusses a history of the military commissions and how the body of legal rights assigned to the detainees at Guantanamo Bay have grown over the years. Part II discusses the use of hearsay in international courts and tribunals in recent history. Part III analyzes the specific circumstances in which hearsay is likely to arise in the military commissions and its potential impact on these proceedings.

I. THE EVOLUTION OF THE RIGHTS OF THE ACCUSED, FROM 2001 TO PRESENT

Since the first prisoners of the War on Terror were captured on the battlefields of Afghanistan, the rights and legal statuses of detainees have evolved significantly. The procedural protections afforded to the accused in today's military commissions in Guantanamo Bay are vastly different from the rights that existed at the time the idea of the military commissions first came about. In 2001, The Authorization for Use of Military Force gave the President the authority to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks

7. Office of Public Affairs, *Justice Department Refers Five Accused 9/11 Plotters to Military Commissions*, U.S. Dep't of Justice (Apr. 4, 2011), <http://www.justice.gov/opa/pr/2011/April/11-ag-421.html>.

8. Don Borelli, *Trying Terrorist in Civilian Court is the Right Move*, THE HILL CONG. BLOG (Oct. 17, 2013), <http://thehill.com/blogs/congress-blog/homeland-security/328939-trying-terrorist-in-civilian-court-is-the-right-move>.

that occurred on September 11, 2001.”⁹ That included “the power to capture and detain those described in the congressional authorization. The government may therefore hold at Guantanamo and elsewhere those individuals who are part of al-Qaida, the Taliban, or associated forces.”¹⁰ The law did not provide the detainees with the right to challenge their detention in court or address the burden the government must meet in order to detain them.¹¹

Shortly thereafter, President George W. Bush issued an executive order authorizing the use of military commissions to try suspected terrorists.¹² The rules of evidence under this plan were extremely loose, and nowhere in the order does it mention the word “hearsay.”¹³ Rather, it allowed for the introduction of any evidence at the military commission, provided that a “reasonable person” would find it had probative value either: (1) in the opinion of the Presiding Officer, or (2) in the opinion of the majority of the commission, if any of the members of the commission requested to have the commission make the determination in lieu of relying upon the view of the Presiding Officer.¹⁴

But before the first suspects could be tried by military commission, multiple habeas petitions on behalf of the captives were working their way through the federal court system. What resulted was a tug of war, between the Executive Branch, the Congress, and the Courts as to the appropriate rights and procedures for the detainees at Guantanamo. In 2004, the Supreme Court issued its landmark decision in the case of *Rasul v. Bush*, finding that the degree of control exercised by the United States over the Guantanamo Bay base was sufficient to trigger the application of habeas corpus rights for the detainee.¹⁵ This was essentially the first time that the Court affirmatively recognized at least

9. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

10. *Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004)).

11. *Al-Adahi v. Obama*, 613 F.3d at 1103.

12. Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

13. *Id.*

14. *Id.*

15. *Rasul v. Bush*, 542 U.S. 466 (2004).

certain legal rights pertain to the detainees. In *Hamdi v. Rumsfeld*, which was decided on the same day as *Rasul*, the Court also considered the rights of a U.S. citizen detained in Guantanamo as an enemy combatant and addressed the issue of hearsay as it pertains to enemy combatants.¹⁶ In that case, a U.S. citizen who was captured in Afghanistan and designated an enemy combatant challenged his confinement claiming that his detention, based on a third-party hearsay affidavit, violated the Fifth and Fourteenth Amendments.¹⁷ In its decision, the Court recognized that:

[h]earsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.¹⁸

Although *Rasul* and *Hamdi* were both decided in the context of habeas petitions, they stand for the principle that even enemy combatants have certain inalienable rights that will be recognized by the courts.¹⁹ Nevertheless, the Court acknowledged that detaining these individuals on the basis of hearsay did not violate the Constitution, provided the detainee has a fair opportunity to challenge this evidence.²⁰

In the days following the *Rasul* and *Hamdi* decisions, U.S. Deputy Secretary of Defense Paul Wolfowitz responded by establishing Combatant Status Review Tribunals (CSRTs) to determine whether detainees being held in Guantanamo Bay were properly designated as "enemy combatants."²¹ The Order defined enemy combatants as individuals who were "part of or supporting Taliban or al Qaeda forces

16. *Hamdi v. Rumsfeld*, 542 U.S. 507, 524-25 (2004).

17. *Id.*

18. *Id.* at 533-34.

19. *See Hamdi v. Rumsfeld*, 542 U.S. 507; *Rasul v. Bush*, 542 U.S. 466.

20. *Id.*

21. Memorandum from the Deputy Sec'y of Def. to the Sec'y of the Navy (July 7, 2004), *available at* <http://www.defense.gov/news/jul2004/d20040707review.pdf>.

or associated forces that are engaged in hostilities....”²² The CSRTs provided that detainees have a military officer represent them at a hearing, and that the officer share any information with them regarding their charges except for classified information.²³ The tribunals consisted of 3 commissioned officers, and detainees were allowed to call witnesses if those witnesses were reasonably available.²⁴ It was the province of the tribunal to determine the availability of the witnesses.²⁵ Moreover, detainees had the right to testify before the tribunal but were not required to.²⁶ In keeping with Hamdi, the tribunal was allowed to consider hearsay evidence, as long as it took into account the reliability of the information.²⁷ However, other than that, the rules with respect to hearsay were vague and great deference was given to the tribunal for determining whether a piece of hearsay is reliable.

On December 30, 2005, Congress passed the Detainee Treatment Act of 2005 (DTA), which essentially codified the Combatant Status Review Tribunals.²⁸ The DTA also sought to eliminate the federal courts’ jurisdiction to hear habeas petitions as established by Hamdi, in favor of a more limited review by the D.C. Court of Appeals.²⁹ However, the DTA and the CSRTs were short lived. Less than two years after their creation, the Supreme Court struck down the DTA for violating the Uniform Code of Military Justice and the Geneva Convention in the case of Hamdan v. Rumsfeld.³⁰ Justice Stevens, writing for the majority, found the Hamdan commission to be flawed for several reasons, including that the defendant could be prevented from learning certain evidence being used against him and that the commission could admit

22. *Id.* at 1.

23. *Id.*

24. *Id.* at 2.

25. *Id.*

26. *Id.*

27. *Id.*

28. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1005-1006, 119 Stat. 2739 (2005).

29. *Id.* §§ 1005(e)(2)(A)-(B), 1005(e)(3)(A)-(C).

30. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

hearsay evidence, even if it was the product of torture.³¹ Congress quickly responded by passing the Military Commissions Act of 2006, which sought to remedy the procedural flaws noted by the Court in *Hamdan*.³² The 2006 Act kept much of the procedures under the DTA intact, including the admission of hearsay evidence, and places the burden on the adverse party to prove that the proffered evidence is unreliable or lacks probative value.³³

While the Military Commissions Act of 2006 attempted to address the concerns raised by the Supreme Court in earlier decisions, the Act failed to satisfy this goal. Shortly after its passage, it, too, was struck down as unconstitutional in *Boumediene v. Bush*.³⁴ The Court found that the Act's suspension of judicial review for detainee's habeas petitions constituted an unconstitutional suspension of the writ.³⁵ In a strongly-worded dissent, Chief Justice Roberts, joined by Scalia and Thomas, chastised the majority's holding that the enemy combatants should have access to domestic courts and noted that the detainees at Guantanamo already have more rights than exist under the Geneva Convention.³⁶

Finally, in October of 2009, Congress passed the Military Commissions Act of 2009, which provided additional rights to the detainees, including the right of judicial review on their habeas claims.³⁷

31. *Id.* at 613-17 ("Another striking feature of the rules governing *Hamdan*'s commission is that they permit the admission of *any* evidence that, in the opinion of the presiding officer, would have probative value to a reasonable person. Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn.") (internal quotations and citations omitted).

32. Military Commissions Act of 2006, Pub. L. No. 109-366, §949a, 120 Stat. 2600 (2006).

33. *Id.*

34. *Boumediene v. Bush*, 553 U.S. 723 (2008).

35. *Id.*

36. *Id.* at 817 (Roberts, C.J., dissenting) ("And yet the Guantanamo detainees are hardly denied all legal assistance. They are provided a 'Personal Representative' who . . . may access classified information, help the detainee arrange for witnesses, assist the detainee's preparation of his case, and even aid the detainee in presenting his evidence to the tribunal.").

37. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2574-612 (2009).

Interestingly, the Act of 2009 also set forth a more comprehensive framework for the admissibility of hearsay during the commissions.³⁸ In order for hearsay to now be admissible, (1) the proponent must make it known to the adverse party of its intention to use hearsay; (2) the judge must consider “all of the circumstances surrounding the taking of the statement, including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne” and then determine that the statement is offered as evidence of a material fact, the statement is probative, direct testimony of the witness is not practical, and finally, that the interests of justice are served.³⁹ This standard is further set forth in Rule 803(b) of the Manual for Military Commissions of 2012, which details the rules of procedures of the commission.⁴⁰

There is no question that the rights and procedures afforded to the defendants in the military commissions are more expansive today than they were in the early days of the Bush administration. In addition to providing a more specific framework for the admissibility of hearsay, the 2009 amendments also prohibit the admissibility of statements made under duress or as the result of torture.⁴¹ This includes a prohibition of statements elicited through “torture or cruel, inhuman or degrading treatment” as well as forced self-incrimination.⁴²

While the rules governing the use of hearsay in military commissions have evolved, the commissions will never be seen as legitimate in the eyes of the international community if they are viewed as being inconsistent with international norms. Therefore, it is necessary to compare the hearsay standards, as set forth in the 2009 amendments, with those of the international community.

38. *Id.* at 2582-83.

39. 10 U.S.C. § 949a(b)(3) (2009).

40. U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS, pt. III, R. 803(b) (2012), available at <http://www.mc.mil/Portals/0/pdfs/2012ManualForMilitaryCommissions.pdf>.

41. 10 U.S.C. § 948r.

42. *Id.*

II. HEARSAY IN INTERNATIONAL LAW

Critics of the military commissions point to hearsay as one of the reasons why the detainees purportedly cannot receive a fair trial in Guantanamo Bay. It is well-settled that the Confrontation Clause of the U.S. Constitution provides the right for those accused of crimes to face their accusers in open court.⁴³ Generally, this clause prohibits the prosecution from introducing out-of-court statements from victims or witnesses in their case in chief.⁴⁴ In other words, a witness in a criminal prosecution must testify live, in person, and be subject to cross-examination.⁴⁵ While there is some evidence that the confrontation principle dates back until at least ancient Roman times, this strict ban on hearsay is a uniquely Anglo-American common law concept.⁴⁶ In fact, international courts today usually admit hearsay evidence under certain circumstances.⁴⁷ Moreover, international tribunals dating back to Nuremberg have been providing fair trials to defendants using certain types of hearsay.⁴⁸ While it is agreed that the Guantanamo Bay defendants should be entitled to fair legal process, opinions differ on how

43. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”).

44. *Hickory v. United States*, 151 U.S. 303, 309 (1894) (stating that hearsay is the prior out-of-court statements of a person, offered affirmatively for the truth of the matters asserted, presented at trial either orally by another person or in written form); FED. R. EVID. 801(c).

45. *See Pointer v. Texas*, 380 U.S. 400, 404 (1965) (holding that “the right of cross-examination is included in the right . . . to confront the witness[.]”).

46. *See Coy v. Iowa*, 487 U.S. 1012, 1015 (1988); *see also Crawford v. Washington*, 541 U.S. 36, 43 (2004) (“English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.”).

47. *See David Weissbrodt et al., Piercing the Confidentiality Veil: Physician Testimony in International Criminal Trials Against Perpetrators of Torture*, 15 MINN. J. INT’L L. 43, 61 (2006).

48. *See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, and Charter of the International Military Tribunal* art. 19, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. (hereinafter “Nuremberg Charter”).

to achieve this. Some scholars have noted that “[l]egal process may be fair and meaningful even if detainees are not afforded the full panoply of safeguards that a state ordinarily affords criminal defendants. Many such safeguards reflect a state’s own legal and normative traditions and are not required by international law.”⁴⁹

Whether the 9/11 defendants should be entitled to all the same protections as any criminal defendant in the American court system is an interesting question worthy of discussion. However, that question is immensely different than the question of whether the Guantanamo commissions, as they exist today, can provide a fair trial that stands up to international scrutiny. Critics who accuse the United States of violating international law in the Guantanamo military commissions should be reminded of certain similarities between these military commissions and the UN-sanctioned and internationally recognized tribunals for other war criminals. For instance, there is no ban on the use of hearsay among the many rights enumerated in the Geneva Convention.⁵⁰ There is also no ban on hearsay for the International Criminal Court, the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, all of which were sanctioned by the United Nations.⁵¹ In fact, the Nuremberg trials following World War II, which were the first military tribunals of modern times, also did not ban hearsay evidence.⁵² The Nuremberg trials further confirm the notion that “a ban on hearsay is not an internationally recognized judicial guarantee.”⁵³ In fact, some have argued that the use of hearsay - even hearsay from anonymous witnesses - is so common that it risks becoming the norm in international criminal tribunals.⁵⁴

49. Monica Hakimi, International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide, 33 YALE J. INT’L L. 369, 408 (2008).

50. Morris D. Davis, Op-Ed., *The Guantánamo I Know*, N.Y. TIMES, June 26, 2007, at A21.

51. *Id.*

52. *Id.*

53. *Id.*

54. See David Lusty, Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials, 24 SYDNEY L. REV. 361 (2002).

Historically, the rules of evidence have been relaxed in wartime tribunals and courts were given wide-latitude to admit any evidence the court found to have probative value.⁵⁵ Article 19 of the Nuremberg Charter specifically freed the tribunal of “technical rules of evidence” instead favoring “expeditious and non-technical procedures.”⁵⁶ Accordingly, hearsay evidence was admitted with much greater frequency than typically allowed under the national laws at the time.⁵⁷ This included allowing unsworn testimony from deceased individuals.⁵⁸

The proper role hearsay has resurfaced in recent years in the International Criminal Tribunal for Former Yugoslavia (ICTY). By way of background, the United Nations Security Council established the ICTY in February of 1993, to prosecute the alleged perpetrators of widespread human rights violations within the territory of the former Yugoslavia.⁵⁹ Thereafter, on May 25, 1993, the Security Council adopted The Statute of the International Tribunal, which set forth certain rules and procedures for the ICTY.⁶⁰ The statute provided that the judges of the ICTY were responsible for drafting the rules of evidence that would apply throughout the proceedings.⁶¹ While the ICTY procedural rules initially indicated a preference for live testimony, they have always been more open than the American system for allowing the use of depositions, video testimony, transcripts of prior testimony, and the taking of judicial notice.⁶² More recently, the rules of evidence of the ICTY have been

55. U.N. War Crimes Comm’n, *Law Reports of Trials of War Criminals*, vol. XV at 197 (1949).

56. Nuremberg Charter, Art. 19.

57. See U.S. DEP’T OF DEF., *supra* note 40.

58. United States v. Karl Brandt et al., Case No. 1, at 1 (Nuremberg Military Trib. 1946) (“The Medical Case”) (accepting unsworn witness statements and sworn witness statements of deceased individuals); see also United States v. Josef Altstotter et al., Case No. 3, at 1 (Nuremberg Military Trib. 1947) (“The Justice Case”) (accepting sworn witness statements of deceased individuals).

59. S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/808, at 1 (Feb. 22, 1993).

60. S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 at 1-2 (May 25, 1993).

61. *Id.*

62. Patricia M. Wald, *Running the Trial of the Century: The Nuremberg Legacy*, 27 CARDOZO L. REV. 1559, 1588 (2006).

relaxed even further to allow for the admission of written witness statements, provided they do not go to prove the accused's conduct.⁶³

When deciding whether to admit hearsay evidence that one side has objected to, one ICTY trial court stated that:

[T]he Trial Chamber will determine whether the proffered evidence is relevant and has probative value, focusing on its reliability The Trial Chamber may be guided by, but not bound to, hearsay exceptions generally recognized by some national legal systems, as well as the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate.⁶⁴

Interestingly, the prosecutor of the Tadic tribunal, Alan Tieger, commented after the trial that the tribunal's lax hearsay rules actually limited the amount of hearsay that was ultimately admitted.⁶⁵ Although one witness did testify anonymously, Tieger noted that:

[T]he very fact that there was no specific prohibition on hearsay meant that there were no specific exceptions allowing its use. That in turn meant that every attempt to introduce hearsay was accompanied by lengthy argument about its propriety, which tended to focus more attention on that particular piece of evidence than the proponent ever intended. Since both sides wanted the court to focus on the most reliable, persuasive, and significant evidence, the process tended to become self-regulating as the parties became gun shy about hearsay. Virtually all of the hearsay admitted fell within exceptions that would be recognized in jurisdictions regarded as much more stringent with

63. *Id.* at 1589.

64. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion on Hearsay (Int'l Crim. Trib. for the former Yugoslavia Aug. 5, 1996); Prosecutor v. Tadic, Case No. IT-94-1, Opinion and Judgment, ¶ 555 (Int'l Crim. Trib. for the former Yugoslavia May 7, 1997).

65. Alan Tieger, *Prosecutor, Prosecutor v. Dusko Tadic, International Criminal Tribunal for the former Yugoslavia in War Crimes Tribunals: the Record and the Prospects*, 13 AM. U. INT'L L. REV. 1441, 1445 (1998).

respect to that rule, and none of the hearsay dealt with the critical acts charged or the essential elements of proof.⁶⁶

In the trial of Stanislav Galic, a Commander in the Bosnian Serb Army who was charged with violating the laws of war in regards to an attack on civilian populations in Sarajevo, prosecutors sought to introduce two written statements from witnesses made to investigators for the prosecution.⁶⁷ Both witnesses died before they could testify at trial.⁶⁸ Under American law, those witness statements would be suppressed, unless the government could demonstrate that witness gave prior testimony under oath and that the defendant had a full and fair opportunity to cross-examine the witness on the contents of the statement. Otherwise, the statement would be inadmissible. The ICTY's Appeals Chamber engaged in a careful analysis of the Court's Rules of Evidence concerning hearsay evidence.⁶⁹ Rule 92bis(C) of the ICTY allows for the introduction of a witness's written statements when that witness has died or "can no longer with reasonable diligence be traced" or cannot testify due to a physical or mental disability, provided that the Court "finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability."⁷⁰ Interestingly, the requirements under Rule 92bis(C) of the ICTY are substantively similar to the rules of evidence at play in the Guantanamo Commissions.⁷¹

The ICTY is not the only international tribunal of recent years to allow for the admissibility of some hearsay evidence. The Special Court for Sierra Leone (SCSL), which was established to prosecute violations of international law that occurred during Sierra Leone's civil war, has

66. *Id.*

67. Prosecutor v. Galic, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal concerning Rule 92 bis (C), ¶ 8 (Int'l Crim. Trib. For the Former Yugoslavia June 7, 2002).

68. *Id.*

69. *Id.*

70. ICTY R. 92 *bis*(C) (emphasis added).

71. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2739 (2005).

also grappled with the appropriate use of hearsay evidence.⁷² In the trial of Charles Taylor, the former President of Liberia, the Court analyzed hearsay testimony in the context of the U.S. Constitution's Confrontation Clause and found it to be admissible.⁷³

By way of background, Taylor was indicted by the SCSL in May 2006 and charged with several counts of murder, rape, enslavement, and other crimes against humanity allegedly committed in Sierra Leone between 1996 and 2002.⁷⁴ The trial commenced in April 2007 and after roughly five years, Taylor was convicted and sentenced to 50 years confinement.⁷⁵ The defense appealed his conviction on multiple grounds, including the erroneous introduction of evidence.⁷⁶ Specifically, the defense argued that the Trial Chamber relied on "uncorroborated hearsay" and failed to assess the reliability of hearsay evidence.⁷⁷ In its decision, the Appeals Chamber noted that it "does not accept that as a general principle of law applicable to international criminal proceedings, uncorroborated hearsay evidence can never be the sole or decisive basis for a conviction."⁷⁸ The Appeals Chamber went on to cite a decision from the European Court of Human Rights (ECtHR), which held that "reliance on an uncorroborated hearsay statement as the sole or decisive basis for a conviction is not precluded as a matter of law and does not per se violate the accused's right to a fair trial."⁷⁹ The Appeals Chamber also noted that ECtHR decisions have been "recognized by international criminal tribunals as a source of guidance regarding fair trial rights."⁸⁰

Interestingly, Taylor's defense cited the U.S. Supreme Court case of *Crawford v. Washington*, which held that prior testimonial statements, not subject to cross-examination, violate the Confrontation Clause.⁸¹

72. *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment (Spec. Ct. for Sierra Leone Sept. 26, 2013).

73. *Id.*

74. *Id.* at 5.

75. *Id.* at 11, 14.

76. *Id.* at 16.

77. *Id.* at 47.

78. *Id.* at 82.

79. *Id.* at 85 (citing *Al-Khawaja & Tahery v. U.K.* 147).

80. *Id.* at 84.

81. *Id.* at 35 n. 182.; *see also Crawford*, *supra* note 46, at 68.

Rather than recognizing Crawford as a widely-accepted norm in criminal prosecutions, the Appeals Chamber stated that Crawford is “a decision of a domestic court applying its domestic constitution,” and went on to note that Crawford applies only to testimonial statements.⁸² If a testimonial statement is a uniquely civilian concept, as some have argued, then the U.S. Constitution’s Confrontation Clause does not apply to military commissions.⁸³ Nevertheless, the Taylor Appeals Chamber found that the tribunal “embodies the principle articulated in Crawford and Davis [*v. Washington*]”⁸⁴ One must not be of the impression that the SCSL allowed the introduction of any and all hearsay evidence in the trial of Charles Taylor. To the contrary, the Appeals Chamber noted the precautions and procedures that must be followed to ensure the reliability of the evidence.⁸⁵ In its decision, the Appeals Chamber found that the trial court examined hearsay evidence with caution before allowing it into evidence, noting that “the weight to be afforded to such evidence will usually be less than that accorded to the evidence of a witness who has given the evidence under oath . . . and who has been tested in cross-examination.”⁸⁶ The Appeals Chamber went on to find that the trial court “took into account whether or not the hearsay evidence was voluntary, truthful, and trustworthy, and considered both its context and the circumstances under which it arose.”⁸⁷

There exists a perception among some, that the international criminal tribunals such as the ICTY and SCSL are inherently unfair due, in part, to their admission of certain hearsay evidence.⁸⁸ However, according to

82. Prosecutor v. Taylor, *supra* note 71, at 35 n.182.

83. Christina M. Frohock, Military Justice as Justice: Fitting Confrontation Clause Jurisprudence into Military Commissions, 48 NEW ENG. L. REV. 255, 255 (2014).

84. See Prosecutor v. Taylor, *supra* note 71, at 83 n.182.

85. *Id.* at 149-51.

86. *Id.* at 150.

87. *Id.*

88. See David Aronofsky, International War Crimes & Other Criminal Courts: Ten Recommendations for Where We Go from Here and How to Get There - Looking to a Permanent International Criminal Tribunal, 34 DENV. J. INT’L L. & POL’Y 17, 24 (2006) (“One of the most polemic themes involving international criminal tribunals to date has involved the use of anonymous witnesses, which involves hearsay problems that call into question the fairness of the underlying trials.”).

Professor Jenia Iontcheva Turner, who surveyed forty-four defense attorneys who had represented accused persons before the ICTY, SCSL and the International Criminal Tribunal for Rwanda (ICTR), the vast majority believe that the “trials serve primarily adjudicative purposes - separating the innocent from the guilty, following fair procedures, and apportioning just punishment to those who are convicted.”⁸⁹ The defense attorneys she surveyed had a general belief that their clients were innocent, that the results of the tribunal were not pre-determined and that it was possible to get an acquittal.⁹⁰ In fact, both the ICTY and ICTR have resulted in acquittals.⁹¹

The international community has recognized the need for flexibility when it comes to the admissibility of evidence in wartime tribunals.⁹² Patricia Wald, former Judge of the ICTY, has written about the challenges in procuring witnesses to testify in the tribunal and the need for a “hybrid admissibility standard” when it comes to witness testimony.⁹³ The ICTY has recognized not only the difficulties in finding witnesses to come forward and testify about war crimes, but also the fallibility of live testimony.⁹⁴ This includes a recognition that “all live testimony carries with it the possibility of distortion as to what really occurred.”⁹⁵ While the ICTY and other international tribunals favor the use of live testimony, as they should, they provide necessary exceptions and accommodations, much like the commissions in Guantanamo.

89. Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 531 (2008).

90. *Id.*

91. *Acquittals*, UN ICTY, <http://www.icty.org/sid/9984> (last visited Sept. 23, 2014); *Appeals Chamber Acquits and Releases Justin Mugenzi and Prosper Mugiranza*, ICTR, <http://www.unictr.org/tabid/155/Default.aspx?id=1344> (last visited Sept. 23, 2014).

92. Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 219-20 (2002).

93. *Id.* at 227.

94. *Id.* at 225-27.

95. *Id.* at 226.

III. THE USE OF HEARSAY IN GUANTANAMO COMMISSIONS

If the international tribunals of recent years teach us anything with respect to hearsay, it is that hearsay must be corroborated, reliable, and admitted with caution. Accordingly, in order for the Guantanamo commissions to be fair and legitimate, this standard must be met. The necessity of certain types of hearsay may arise from the realities of war. The MCA recognizes that “many witnesses in a military commission prosecution are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death.”⁹⁶ The specific instances in which hearsay is likely to arise deserve a closer look.

There are currently six military commissions underway in Guantanamo, however, only three are currently being actively prosecuted. One of the active cases is for the five defendants accused of masterminding or facilitating the September 11, 2001 terrorist attacks.⁹⁷ Their names are Khalid Sheikh Mohammed, Walid Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali and Mustafa Ahmed al-Hawsawi.⁹⁸ The second is for Abd al-Rahim al-Nashiri, the alleged mastermind of the USS Cole bombing on October 12, 2000.⁹⁹

In capital cases, such as the two currently underway, the commission consists of a military judge and twelve members.¹⁰⁰ The members are commissioned officers from all branches of the armed forces and serve the role of a jury.¹⁰¹ “Each member has an equal voice” on the panel and “[n]o member may use rank or position to influence another.”¹⁰² The

96. MILITARY COMM’NS R. EVID 802, Discussion.

97. Charge Sheet at 17-20, *United States v. Mohammed* (Military Comm’ns 2001), available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(Sworn%20Charges\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(Sworn%20Charges).pdf).

98. *Id.* at 1.

99. See Charge Sheet, *United States v. Al Nashiri* (Military Comm’ns 2011), available at [http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(Sworn%20Charges\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(Sworn%20Charges).pdf).

100. R. MILITARY COMM’NS 501(a)(2).

101. R. MILITARY COMM’NS 502(a)(2).

102. *Id.*

selection process is quite similar to civilian criminal trials. A voir dire process takes place whereby the prospective members are questioned by the attorneys for both sides, as well as by the military judge.¹⁰³ Members can be removed for cause and each side is granted one peremptory challenge.¹⁰⁴ Once the members are selected, the presentation of evidence is also quite similar to civilian trials. The prosecution presents its evidence first, followed by the defense, followed by rebuttals from each side.¹⁰⁵ Witnesses must testify under oath, and are subject to direct and cross-examination, and re-direct and re-cross as necessary.¹⁰⁶ The accused is presumed innocent until proven guilty and guilt must be proven beyond a reasonable doubt.¹⁰⁷ Once all the evidence has been presented, the members deliberate in a closed session and voting is done by secret ballot.¹⁰⁸ A two-thirds majority is needed to convict, and on capital charges, the verdict must be unanimous.¹⁰⁹

In the al-Nashiri matter, the government has already put the defense on notice that it intends to offer out-of-court statements of a witness in their case-in-chief.¹¹⁰ Specifically, the prosecution seeks to offer the statement of Saleh Hussein Mohammed Al-Akl, who allegedly rented property to the accused in August 1999.¹¹¹ Al-Akl, a Yemeni citizen, was interviewed in Yemen by the agents of the Federal Bureau of Investigation (FBI) in December 2000.¹¹² In lieu of Al-Akl's testimony at trial, the government will call one of the FBI agents who interviewed him and the FBA agent will testify that Al-Akl appeared healthy, had no

103. R. MILITARY COMM'NS 912(d).

104. R. MILITARY COMM'NS 912(f)-(g).

105. R. MILITARY COMM'NS 913(c)(1)(A)-(D).

106. R. MILITARY COMM'NS 913(c)(2).

107. R. MILITARY COMM'NS 920(e)(5)(A).

108. R. MILITARY COMM'NS 921(a), (c).

109. R. MILITARY COMM'NS 921(c)(2).

110. See Notice to the Defense of the Government's Intention to Offer Certain Items of Corroborated, Lawfully Obtained, Probative, and Reliable Hearsay Evidence Where the Declarants are Unavailable, Hostilities Pose Unique Circumstances, and Admission is in the Interest of Justice, United States v. Al Nashiri (Military Comm'ns 2013), available at

[http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(AE166\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE166).pdf).

111. *Id.* at 3.

112. *Id.*

bruises or marks on his body, and spoke freely without coercion.¹¹³ The agent will further testify that his FBI colleagues took contemporaneous notes of Al-Akl's statements, which formed the contents of the report that the government wishes to admit.¹¹⁴

According to the prosecution, Al-Akl recognized the accused in a photo array and was able to confirm certain biographical information concerning al-Nashiri.¹¹⁵ Additionally, Al-Akl's statement that he was al-Nashiri's landlord is further corroborated by a lease dated August 22, 1999, which was purportedly signed by al-Nashiri.¹¹⁶ Al-Akl's testimony is important to the government's case because he stated to investigators that al-Nashiri had a boat at the rented property that matched the description of the boat used in the October 2000 attack.¹¹⁷ The description of the boat is further corroborated by at least a dozen other witnesses.¹¹⁸ Al-Akl has provided other evidence that the government believes is helpful to their case. For instance, Al-Akl allegedly told the investigators that he remembered smelling resin or epoxy, which can be used to repair fiberglass, and that he remembers men painting the boat an off-white color.¹¹⁹ Witnesses describe the attack boat as made of fiberglass, painted an off-white color.¹²⁰

The government argues that Al-Akl's statements to the FBI investigators on December 23, 2000, should be admitted despite being out of court statements offered to prove the truth of the matter asserted. In their notice papers, the government acknowledges that Al-Akl's statements could be considered hearsay, however, it argues that "the interests of justice are strongly served by admitting Al-Akl's demonstrably voluntary, reliable, and highly probative statements, which are overwhelmingly corroborated by an interlocking web of meticulously gathered physical, forensic, and documentary evidence."¹²¹

113. *Id.*

114. *Id.*

115. *Id.* at 4.

116. *Id.*

117. *Id.* at 5.

118. *Id.* at 5-6.

119. *Id.* at 6.

120. *Id.*

121. *Id.* at 8.

Based on this one example, the evidence offered by the prosecution appears to be reliable and highly probative. Moreover, the fear of secret witnesses being the sole basis of a conviction is far-removed. Here, the person providing the information is readily identified. The circumstances of the witness's statement are well known and the agent who recorded the statement is subject to cross-examination. The panel members will be able to weigh the credibility of this investigator and determine whether the statement has the overall indicia of reliability. Furthermore, the risk of prejudice to the defendant if certain hearsay is admitted is less severe in military commissions than in civilian court. As noted above, commission panelists consist of military professions who are trained and experienced in following orders. They are more likely than civilian lay jurors to carefully follow the rule of law and apply the appropriate reliability analysis to any hearsay that has been introduced.

In addition to being fair for the accused, the flexible standard of evidence in military commissions is also necessary. Under domestic law, the exclusionary rule suppresses evidence that was obtained by police without a warrant and statements that were made by suspects who had not been properly Mirandized.¹²² However, there is no precedent for the exclusionary rule to apply in war scenarios abroad. In fact, in his testimony concerning the proposed 2009 amendments to the Military Commissions Act before the Senate Judiciary's Subcommittee on Terrorism and Homeland Security, Assistant Attorney General David Kris acknowledged that military commissions "take into account the reality of battlefield situations and military exigencies, while affording the accused due process."¹²³ He went on to note that the Justice Department "[does] not support requiring our soldiers to give Miranda warnings to enemy forces captured on the battlefield, and nothing in our proposal would require this result, nor would it preclude admission of voluntary but non-Mirandized statements in military commissions."¹²⁴ It

122. See *Miranda v. Arizona*, 384 U.S. 439 (1966).

123. Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond, Hearing before the Subcomm. on Terrorism and Homeland Security of the S. Comm. on the Judiciary, 111th Cong. (2009) (statement of Asst. Att'y Gen. David Kris.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg57711/pdf/CHRG-111shrg57711.pdf>.

124. *Id.* at 2.

is absurd to imagine how otherwise credible information obtained by U.S. troops on the battlefield would be suppressed because a soldier did not properly read Miranda rights to a foreign enemy combatant. Moreover, contemporary criminal procedure, such as the exclusionary rule, is designed to regulate police conduct in our society, and has little to no bearing on the credibility of the evidence recovered.¹²⁵

The limitations of American criminal procedure are clear when applied to wartime scenarios. Without a more flexible standard for the introduction of evidence, it is possible that none of the 9/11 defendants could ever be brought to justice. In fact, some have rightfully noted that:

[R]eliance on hearsay is even more crucial in this war because many witnesses are likely to be foreign nationals, and compelling them to appear at the commission might be difficult; also, many will be unavailable due to imprisonment or even death at the hands of al Qaeda, or in other cases, their own governments.¹²⁶

If the prosecutions of the 9/11 defendants, or other enemy combatants, could not go forward because of witnesses who were deceased, missing, imprisoned, or otherwise outside the government's subpoena power, the end result would be a tremendous injustice.

CONCLUSION

While the rules of evidence with respect to hearsay are looser in the military commissions at Guantanamo Bay than in federal courts, the rights and protections of the accused are in keeping with international norms. Of course, the fairness of the military commissions does not rest on the use of hearsay alone. Serious allegations have surfaced involving claims that some secret agency may have surreptitiously listened to privileged conversations between the defendants and their attorneys,¹²⁷

125. JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 218 (2006).

126. GLENN SULMASY, *THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR* 112 (2009).

127. Carol Rosenberg, *Guantanamo Smoke Detector/Listening Device Revealed*, *MIAMI HERALD* (Mar. 12, 2013), *available at*

and also that certain legal papers in the defendants' possession were discarded.¹²⁸ Although there is no evidence that any privileged information was compromised, the mere existence of these claims may undermine the public's confidence in the commissions. They also provide additional fodder to the commissions' critics. To that end, the government has a duty to seriously address these allegations and others that may arise during future proceedings.

Additionally, while the defendants in the military commissions have adequate rights and processes, not all of the Guantanamo detainees will even be tried before a court.¹²⁹ Both the Obama and Bush administrations have conceded that there are certain detainees who will never be brought up on charges and will likely be held indefinitely.¹³⁰ This remains a delicate issue that runs the risk of overshadowing the legitimacy of the military commissions, no matter how far they have come in ensuring fairness for the accused.

However, while the Guantanamo military commissions lack every procedural protection available to defendants in American criminal courts, the rights and procedures, particularly those involving hearsay, are appropriate under the circumstances and defensible under international law.

<http://www.miamiherald.com/2013/03/12/3281492/guantanamo-smoke-detectorlistening.html>.

128. Arun Rath, *9/11 Defense Attorneys Say Legal Documents Were "Ransacked"*, PBS FRONTLINE (Feb. 13, 2013), <http://www.pbs.org/wgbh/pages/frontline/iraq-war-on-terror/911-defense-attorneys-say-legal-documents-were-ransacked/>.

129. See Exec. Order No. 13,567, 3 C.F.R. 13567 (2011); cf. Presidential Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

130. *Id.*

